Special Alert: WTK 2023 Employment Checklist and Late-Breaking Developments re: Non-Disclosure Agreements, Retirement Plans, and Predictive Scheduling

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In case you missed it: **WTK's *updated* comprehensive checklist for 2023** will assist you in achieving compliance with all the latest legal changes. This much anticipated checklist contains the newest employment updates (including the updates outlined below) so you can make sure your company remains complaint in the new year. **You can access the Checklist here.**

In the month since our last update, the U.S. Congress, California Legislature, and Los Angeles City Council have been at work on various employment-related laws that will affect California employers:

- New federal law is expected to prohibit enforcement of any pre-dispute nondisclosure or non-disparagement agreement involving sexual assault or sexual harassment.
- California law requiring employers to offer a payroll deposit retirement savings plan or register for the state-run retirement program (CalSavers) has been expanded to cover employers with one or more employees (employers with 5+ employees already required to be in compliance).
- Los Angeles retail employers with 300+ employees globally must comply with strict new predictive scheduling requirements, including payment of premiums for schedule changes under certain circumstances, starting April 1, 2023.

Federal Limitation on Nondisclosure Agreements re: Sexual Assault and Sexual Harassment Disputes

Federal Senate Bill 4524 – the "Speak Out Act" – addresses concerns that nondisclosure and non-disparagement agreements can silence people who experience sexual harassment, assault, or retaliation and thus perpetuate illegal conduct. The bill has been passed by the U.S. House and Senate and was sent to President Biden for his signature on December 1, 2022. The President is expected to sign the bill into law within the next week.

The bill would prohibit enforcement of any nondisclosure or non-disparagement provision in any agreement entered into before a dispute arises involving sexual assault or sexual harassment. Notably, the law applies to *any* pre-dispute contractual agreements, including agreements between employers and applicants, employees, and independent contractors; and contracts between consumers and providers of goods and services. The law appears designed to cover agreements entered into at the beginning of employment or the commencement of a contractual relationship that prospectively silence the parties about any future sexual assault or sexual harassment disputes. The law does *not* apply to settlement agreements entered into after a dispute has arisen.

The Speak Out Act will apply to claims filed under Federal, State or Tribal law on or after the date the law is signed by the President.

What this Means for California Employers:

California law already prohibits employers from requiring employees to sign – as a condition of employment, continued employment, or receipt of a raise or bonus – a non-disparagement agreement or any other agreement that has the purpose or effect of denying the employee the right to disclose

information about unlawful acts in the workplace, including but not limited to harassment or discrimination. A similar restriction applies to separation agreements entered into between employers and employees upon termination of employment.

Therefore, the new federal law is actually *narrower* than existing California law in connection with certain contracts between employers and employees, because the federal law only applies to nondisclosure agreements regarding sexual harassment or sexual assault disputes, while California law already prohibits nondisclosure agreements regarding *all* types of harassment or unlawful conduct.

On the other hand, the new federal law is *broader* than the existing California law, because the new federal law applies to *all* agreements, including – for example, agreements with independent contractors, applicants, and consumers. And of course, it is broader than California law because it applies nationwide.

Businesses should examine all contractual nondisclosure and non-disparagement agreement to assess whether any changes are needed in light of the new federal law.

Changes to California's Retirement Savings Law

In 2016, the California Legislature enacted the CalSavers Retirement Savings Trust Act, requiring covered employers with five or more employees to either offer a payroll deposit retirement savings plan or register for the state-run retirement program (CalSavers) so their employees can choose to participate. The 2016 law set deadlines for compliance based on employer size:

- Employers with 100+ employees had to comply by September 30, 2020;
- Employers with 50+ employees had to comply by June 30, 2021; and
- Employers with 5+ employees had to comply by June 30, 2022.

Any employers with five or more employees who have not yet complied should visit https://www.calsavers.com/ for more information.

In 2022, Governor Newsom signed SB 1126, which extends these requirements to employers with **one or more** employees, excluding sole proprietorships, self-employed individuals, or other business entities with no employees. This new requirement takes effect on January 1, 2023, and these employers have until December 31, 2025 to comply. The newly expanded eligibility for CalSavers should allow almost any California employee to participate in a workplace retirement savings program.

Los Angeles Retail Worker Predictive Scheduling

There has been increasing interest in "predictive scheduling" over the past few years in California and across the country. The main goal of predictive scheduling is to give hourly workers advance notice of their work schedules and avoid unnecessary last-minute changes. San Francisco, San Jose, and Emeryville already regulate predictive scheduling, and Berkeley is considering a similar ordinance. On November 29, 2022, the Los Angeles City Council approved a predictive scheduling ordinance called the "Fair Work Week Law." If signed by the mayor, the ordinance (Los Angeles Municipal Code Sections 185 and 188) will take effect April 1, 2023. The proliferation of these rules suggests that other cities or the state of California may follow suit with similar regulations. WTK will keep you informed of any developments.

The new Los Angeles ordinance covers **retail businesses** that have 300 or more employees globally (at least one of whom works in the city of Los Angeles). The new ordinance relies on the North American Industry Classification System (NAICS) for the definition of "retail businesses" – if a company falls within the retail trade categories and subcategories 44 through 45 (consisting of establishments primarily engaged in retailing merchandise, generally without transformation), it will be covered by Fair Work Week Law. For a description of the retail trade sector and a list of categories and subcategories, see the Census Bureau's website here: https://www.census.gov/naics/?input=44&chart=2022&details=44. Note that the ordinance does *not* currently cover restaurants, although it does cover grocery stores and other food and beverage retailers.

The ordinance applies to employees who perform at least 2 hours of work within the geographic boundaries of the City of Los Angeles for a covered employer, and who qualify for payment of minimum wage. Council Member Curren D. Price, Jr., who championed the new ordinance, has stated that it will affect more than 70,000 low-wage retail workers

The new ordinance creates numerous detailed obligations for covered employers, summarized below:

- **Good Faith Estimate of Schedule**
  - Employers must provide a written good faith estimate of an employee's work schedule *before* hiring each employee (or upon request from current employee).
  - Employers must have a documented, legitimate business reason, unknown at the time the estimate was provided, to substantially deviate from the good faith estimate.
- **Consideration of Employee Preferences**
  - Employees may inform employers of their requested preferences for hours, times, or location of work.
  - While employers need not grant these requests, if a request is denied, employers must notify the employee in writing of the reason for the denial.
- **Advance Notice of Schedule and Penalties for Changes**
  - Employers must provide **written notice** of the work schedule at least 14 calendar days before the start of the work period (posted where all employees can see or transmitted to each employee).
  - Employers must provide **written notice of any employer-initiated changes** that occur after notice is provided.
    - Employees can decline any hours, shifts or work location changes.
    - Employers must receive written consent from employee to changed hours, shifts, or work location.
  - Employers must **provide "Predictability Pay"** when changes are made to the scheduled date, time, or location of work under certain circumstances:
    - If the number of hours of work remains the same (plus or minus 15 minutes) >> pay one extra hour at the regular rate.
    - If the number of hours of work *increases* by more than 15 minutes >> pay one extra hour at the regular rate.
    - If the number of hours *decreases* by more than 15 minutes >> pay ½ the regular rate for all hours originally scheduled that the employee does not work.
    - Note – Predictability Pay is *not* owed under various circumstances, including when:

- The employee *asks for* the work schedule change;
- The employee voluntarily accepts a schedule change due to the absence of another scheduled employee or an "unanticipated need"; or
- The extra hours worked require payment of an overtime premium.

- **Offer of New Work to Existing Employees before Hiring**
  - Employers must offer additional work to existing employees before hiring new employees or using a contractor or temporary/staffing agency if current employee(s) are qualified and additional hours would not result in payment of overtime.
  - The offer must be in writing, made at least 72 hours prior to hiring. Employees have 48 hours to accept in writing.
  - If more employees accept than hours are available, the employer shall award hours using a fair and equitable distribution method or as specified in any Rules and Regulations.
- **Restriction on Shifts Separated by Less than 10 Hours**
  - Employers should ***not*** schedule employees to work a shift that starts less than ten hours from the end of the employee's last shift.
  - Employers must pay employees time and a half for each shift not separated by at least ten hours. (Note: this appears to apply to *both* the first and second shifts – not just the second shift that starts less than 10 hours after the first shift.)
- **Restriction on Requiring Employees to Find Coverage**
  - Employers may *not* require an employee to find coverage if the employee is unable to work for a reason protected by law.
- **Record Retention and Posting Requirements**
  - Employers must **retain records** related to compliance with this law for current and former employees for at least three years, including:
    - Work schedules
    - Copies of written offers for additional work hours and written responses
    - Written correspondence re: work schedule changes, including but not limited to requests, approvals, denials
    - Good faith estimates to new and existing employees
  - Employers must p**ost notice** re: employee rights under the law (to be published by the Office of Wage Standards of the Bureau of Contract Administration).
- **Prohibition on Retaliation**
  - Employers may not retaliate against employees for actions in accordance with the rules.

Employers face numerous potential penalties for violation of the ordinance, including penalties payable to employees and penalties payable to the city (some assessed per employee; some assessed per day); and violations may be pursued via civil actions or agency enforcement. Thus, covered employers should review the ordinance in detail and/or consult counsel to ensure they are taking the proper steps to comply.

If you have questions about how these new laws will affect your business or advice about how to implement these new requirements, please contact us.

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